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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   WILLIAM SILVERSTEIN,   Case No. 16-cv-00684-DMR

              Plaintiff,

8

         v.   **ORDER ON MOTIONS TO DISMISS**

9   Re: Dkt. Nos. 6, 13

     KEYNETICS INC., et al.,

10

              Defendants.

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12   Defendants 418 Media LLC ("418 Media) and Lewis Howes, and specially appearing

13   Defendants Keynetics, Inc. ("Keynetics") and Click Sales, Inc. ("Click Sales), separately move

14   pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(2) to dismiss Plaintiff William

15   Silverstein's amended complaint. [Docket Nos. 6, 13.] The court ordered the parties to file

16   supplemental briefing on the motions, which the parties timely filed. [Docket Nos. 34-36.] The

17   court held a hearing on April 28, 2016. For the following reasons, Defendants' motions to dismiss

18   are granted because Plaintiff's claims for relief are preempted by federal law.

19   **I.   BACKGROUND**

20   The following facts are taken from the allegations in Plaintiff's amended complaint, and

21   are assumed to be true for purposes of this motion.[1]

22   Plaintiff brings this putative class action alleging violations of California's restrictions on

23   unsolicited commercial email. Plaintiff is a member of the group "C, Linux and Networking

24   Group" on LinkedIn, a professional networking website. FAC ¶ 4. Through his membership in

25   that group, he received unlawful commercial emails ("spam" emails) that came from fictitiously

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     [1] When reviewing a motion to dismiss for failure to state a claim, the court must "accept as true all
     of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

28   (per curiam) (citation omitted).

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1   named senders through the LinkedIn group email system. The emails were sent from the domain

2   "linkedin.com," even though non-party LinkedIn did not authorize the use of its domain, and was

3   not the actual sender of the emails. *Id.* at ¶¶ 30, 42.

4   The bodies of the emails contain links to web pages at linkedinfluence.com,

5   paidsurveyauthority.com, takesurveysforcash.com, click4surveys.com, and

6   getcashforsurveys.com. *Id.* at ¶ 4. Plaintiff alleges upon information and belief that these links

7   "go through clickbank.net," which is owned and operated by Click Sales, and that Click Sales is a

8   wholly owned subsidiary of Keynetics. *Id.* at ¶¶ 6, 14. He also alleges upon information and

9   belief that 418 Media owns the domain name linkedinfluence.com, and that Doe 2 is Lewis

10   Howes, an individual who owns and operates 418 Media. *Id.* at ¶ 12.

11   Plaintiff alleges that the information in the "from" name field in the email headers falsely

12   states who is actually sending or advertising in the spam emails. *Id.* at ¶¶ 32, 34. For example, the

13   "from" names include "Liana Christian," "Whitney Spence," "Ariella Rosales," and "Nona

14   Paine," none of whom are the true senders of the emails. Moreover, the "from" names do not

15   identify the web page links contained in the bodies of the emails, nor do they appear to be

16   associated with any of the Defendants. *Id.* at ¶¶ 36, 37.

17   Plaintiff attached an exemplar email to his amended complaint. It contains the following

18   email header information:

19   From: "Liana Christian" <groups-noreply@linkedin.com>
             Subject: [New discussion] How a newbie banked $5K THIS
20   WEEK…What Nobody Told You About
             Date: Sat, July 11, 2015 1:22 am
21   To: "William Silverstein" <linkedin.com@[redacted]>

22   *Id.* at ¶ 26, Ex. A. The body of the email contains a web link. *Id.* Plaintiff received at least 86

23   spam emails from July 6, 2015 to November 17, 2015 advertising linkedinfluence.com,

24   paidsurveyauthority.com, takesurveysforcash.com, click4surveys.com, and

25   getcashforsurveys.com, all of which had falsified or misrepresented "from" names in their

26   headers. *Id.* at ¶¶ 35, 36.

27   Plaintiff asserts one claim for violation of California Business and Professions Code

28   section 17529.5, which prohibits certain unlawful activities related to commercial email

1   advertisements. He seeks liquidated damages of $1,000 per unlawful email message, as well as

2   attorneys' fees and costs. *Id*. at ¶¶ 65-71. Defendants 418 Media and Howes move pursuant to

3   Rule 12(b)(6) to dismiss Plaintiff's amended complaint on three grounds: 1) Plaintiff's section

4   17529.5 claims are preempted by the federal Controlling the Assault of Non-Solicited

5   Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. §§ 7701-7713; 2) the

6   amended complaint is not pled with the requisite specificity; and 3) Plaintiff does not plead

7   specific facts regarding Howes's liability. Defendants Keynetics and Click Sales join in 418

8   Media and Howes's motion to dismiss on the ground of federal preemption. [Docket No. 13 at 8.]

9   Keynetics and Click Sales also move pursuant to Rule 12(b)(6) for failure to state a claim against

10 Keynetics, and pursuant to Rule 12(b)(2) to dismiss Plaintiff's amended complaint for lack of

11 personal jurisdiction.[2]

II.   LEGAL STANDARDS

13   A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in

14 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

15 When reviewing a motion to dismiss for failure to state a claim, the court must "accept as true all

16 of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

17 (per curiam) (citation omitted), and may dismiss a claim "only where there is no cognizable legal

18 theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to

19 relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing

20 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.

21 2001)) (quotation marks omitted). A claim has facial plausibility when a plaintiff "pleads factual

22 content that allows the court to draw the reasonable inference that the defendant is liable for the

23 misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged

24 must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of

25 a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing

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[2] As discussed below, the court dismisses Plaintiff's claims as preempted pursuant to Rule 12(b)(6). Therefore, it does not reach Defendants' remaining arguments, including Keynetics and Click Sales's motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

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1   *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir.

2   2001), overruled on other grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir.

3   2002).

4   **III.   DISCUSSION**

5   **A.   Preemption**

6   California Business and Professions Code section 17529.5 governs unsolicited commercial

7   email. It provides that it is unlawful for a person or entity "to advertise in a commercial e-mail

8   advertisement either sent from California or sent to a California electronic mail address under any

9   of the following circumstances:"

10   (1) The e-mail advertisement contains or is accompanied by a third-
                party's domain name without the permission of the third party.

11
                (2) The e-mail advertisement contains or is accompanied by
12   falsified, misrepresented, or forged header information.[3] This
                paragraph does not apply to truthful information used by a third
13   party who has been lawfully authorized by the advertiser to use that
                information.
14
                (3) The e-mail advertisement has a subject line that a person knows
15   would be likely to mislead a recipient, acting reasonably under the
                circumstances, about a material fact regarding the contents or
16   subject matter of the message.

17   Cal. Bus. & Prof. Code § 17529.5(a). Plaintiff alleges that the emails at issue violate section

18   17529.5(a)(1) because they were sent from the linkedin.com domain, even though LinkedIn did

19   not authorize the use of its domain and was not the actual sender of the emails. FAC at ¶¶ 30, 42.

20   He alleges that the emails violate section 17529(a)(2) because the "from" names misrepresent who

21   is advertising in the emails and who sent the emails. *Id*. at ¶¶ 32-34, 37, 41, 42.

22   All Defendants move to dismiss on the ground that Plaintiff's section 17529.5 claims are

23   preempted by the federal CAN-SPAM Act. The CAN-SPAM Act contains an express preemption

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25   _____
      [3] The California statute does not define the term "header information." In *Kleffman v. Vonage
26   Holdings Corp*., 49 Cal. 4th 334, 340 n.5 (2010), the California Supreme Court applied the CAN-
      SPAM Act's definition of header information, which is "the source, destination, and routing
27   information attached to an electronic mail message, including the originating domain name and
      originating electronic mail address, and any other information that appears in the line identifying,
28   or purporting to identify, a person initiating the message." (citing 15 U.S.C. § 7702(8)).

1   provision which provides as follows:

2   **(1) In general.** This chapter supersedes any statute, regulation, or
3   rule of a State or political subdivision of a State that expressly
        regulates the use of electronic mail to send commercial messages,
4   *except* to the extent that any such statute, regulation, or rule
        prohibits *falsity or deception* in any portion of a commercial
5   electronic mail message or information attached thereto.

6   **(2) State law not specific to electronic mail.** This chapter shall not
        be construed to preempt the applicability of—

7   **(A)** State laws that are not specific to electronic mail,
            including State trespass, contract, or tort law; or

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9   **(B)** other State laws to the extent that those laws relate to
            acts of fraud or computer crime.

10 15 U.S.C. § 7707(b) (emphasis added).

11   The Ninth Circuit has interpreted the CAN-SPAM Act's preemption clause as "broadly

12 preempt[ing] state regulation of commercial e-mail with limited, narrow exception. Congress

13 carved out from preemption state laws that proscribe 'falsity or deception' in commercial e-mail

14 communications." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1061 (9th Cir. 2009).

15   Defendants make two preemption arguments. First, they assert that Plaintiff's claims are

16 preempted to the extent they challenge the fact that the names in the "from" field misrepresent the

17 actual email advertisers. Such claims do not address false or deceptive information, and instead

18 amount to a "content or labeling requirement." *See Gordon*, 575 F.3d at 1064. Defendants also

19 argue that any challenge to the fact that the emails violated LinkedIn's user agreement is

20 preempted, because breach of a user agreement is not a deceptive practice. Defs.' Mot. at 7-8.

21   In *Gordon*, the Ninth Circuit held that the CAN-SPAM Act's exception from preemption

22 for laws prohibiting "falsity" and "deception" refers to "'traditionally tortious or wrongful

23 conduct.'" 575 F.3d at 1062 (citing *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d

24 348, 354 (4th Cir. 2006)). Thus, in order to satisfy the preemption exception, the false or

25 deceptive information in a commercial email must be material. *Id.* In reaching this conclusion,

26 the Ninth Circuit agreed with the Fourth Circuit's reasoning in *Omega* that "Congress could not

27 have intended, by way of the carve-out language, to allow states to enact laws that prohibit 'mere

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error' or 'insignificant inaccuracies' . . . 'because allowing a state to attach liability to bare

immaterial error in commercial e-mails would be inconsistent with the federal Act's preemption

text and structure.'" *Id*. at 1061 (quoting *Omega*, 469 F.3d at 354-55). Therefore, in order to

prevail on a state law claim alleging false or deceptive header information in a commercial email

and avoid CAN-SPAM Act preemption, a plaintiff must be able to demonstrate that the header

information violates the state statute and contains *material* misrepresentations. *See Wagner v.*

Spire Vision LLC, No. C 13-04952 WHA, 2015 WL 876514, at *3 (N.D. Cal. Feb. 27, 2015); *Asis*

Internet Services v. Member Source Media, LLC, No. C-08-1321 EMC, 2010 WL 1610066, at *4

(N.D. Cal. April 20, 2010) ("In *Gordon*, the Ninth Circuit clearly held that falsity and deception as

used in the CAN-SPAM preemption provision require that a misrepresentation be material.").

       After interpreting the CAN-SPAM Act's preemption clause, the Ninth Circuit in *Gordon*

reviewed the district court's conclusion that the plaintiff's state law claim was preempted. The

plaintiff in *Gordon* argued that the defendant violated Washington's Commercial Electronic Mail

Act ("CEMA") by sending emails with header information that misrepresented the senders'

identity.[4] Defendant, a company called Virtumundo, sent emails from addresses such as

"CriminalJustice@vm-mail.com," "PublicSafetyDegrees@vmadmin.com," and "TradeIn@vm-

mail.com." *Gordon*, 575 F.3d at 1063. Although the *Gordon* plaintiff conceded that he was not

misled or deceived by the information in the "from" lines, he nevertheless argued that "the headers

. . . violate[d] CEMA because they fail[ed] to clearly identify Virtumundo as the e-mails' sender

and therefore misrepresent[ed] or obscure[d] the identity of the sender." *Id*.

       The Ninth Circuit affirmed, finding that the plaintiff's claim was for "incomplete or less

than comprehensive information regarding the [identify of the email] sender." *Id*. at 1064. Such

actions do not amount to "falsity or deception" under the CAN-SPAM Act because "[t]here is of

course nothing inherently deceptive in [defendant's] use of fanciful domain names." *Id*. at 1063.

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[4] The plaintiff in *Gordon* alleged the defendant violated a provision of CEMA that prohibited the
transmission of a commercial electronic email message that "[u]ses a third party's internet domain
name without permission of the third party, or otherwise misrepresents or obscures any
information in identifying the point of origin or the transmission path of a commercial electronic
mail message." *Gordon*, 575 F.3d at 1057 (citing Wash. Rev. Code § 19.190.020(1)(a)).

1   The court noted (and the plaintiff conceded) that the domain registrant could readily be identified

2   by using a "reverse-look-up" database. *Id.* at 1064. The court concluded that the plaintiff's

3   "technical allegations regarding the header information [found] no basis in traditional tort

4   theories," and therefore were preempted. *Id.* at 1064.

5   The *Gordon* plaintiff broadly argued that a spam emailer's attempt to obscure the identity

6   of the sender amounts to actionable, non-preempted deception. Thus, according to the plaintiff,

7   "the only information that could be used in the 'from name' field that would not misrepresent is

8   the name of the 'person or entity who actually sent the e-mail, or perhaps . . . the person or entity

9   who hired the [sender] to send the email on their behalf." *Id.* at 1064 (second alteration in

10   original). The court rejected this theory. It held that "[t]he CAN-SPAM Act does not impose such

11   a requirement," and found that "[t]o the extent such a content or labeling requirement may exist

12   under state law, it is clearly subject to preemption." *Id.* (citing S. Rep. No. 108-102, at 21-22

13   ("State law requiring some or all commercial e-mail to carry specific types of labels . . . or contain

14   specified content, would be preempted.")); *see also Kleffman v. Vonage Holdings Corp.*, No. CV

15   07-2406GAFJWJX, 2007 WL 1518650, at *3 (C.D. Cal. May 23, 2007) (dismissing section

16   17529.5(a)(2) claim based on falsified headers, holding "the claim that the failure to include

17   [defendant's] name in the email is clearly preempted." (citing S. Rep. No. 108-102, at 21-22)).[5]

18   Here, Plaintiff alleges that the information in the email headers is deceptive because it

19   "misrepresents *who* is advertising in the email." FAC ¶ 33; *see also* FAC ¶¶ 34, 37, 40. Plaintiff

20   asserts that the header information is deceptive in two ways. First, he contends that the sender

21   names (e.g., "Liana Christian") are fictitious and false. Second, Plaintiff asserts that the actual

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23   _____

[5] The Ninth Circuit in *Gordon* did not analyze whether the state statute was itself preempted by the
24   CAN-SPAM Act; instead, it determined preemption by examining the particular claims brought
     under the statute. Other courts have followed this approach. For example, in *Asis Internet*
25   *Services v. Member Source Media, LLC*, No. C-08-1321 EMC, 2010 WL 1610066, at *4 (N.D.
     Cal. April 20, 2010), the court dismissed as preempted a claim that it found "amounted to the
26   same allegations that the plaintiff in *Gordon* made: that the header information was deceptive
     because it did not clearly identify [the defendant] as the sender." *See also Kleffman*, 2007 WL
27   1518650, at *3 n.1 (finding the plaintiff's authorities "unpersuasive, as they merely compared the
     language of the statutes at issue to the savings clause, as opposed to examining the nature of the
28   plaintiffs' theory of liability.").

1   senders further hid their identities by using the linkedin.com domain to send the emails, thereby

2   "hijacking" LinkedIn's goodwill.

3   Plaintiff's claim amounts to the same preempted allegations made in *Gordon*; i.e., that the

4   header information is deceptive because it does not clearly identify either the email sender or the

5   entity advertising in the body of the email. *See Gordon*, 575 F.3d at 1063. To be sure, Plaintiff's

6   allegations differ from those made in *Gordon*. In *Gordon*, the plaintiff challenged the defendant's

7   use of domain names that did not clearly identify defendant Virtumundo as the emails' sender,

8   such as "vmmail.com," "vmadmin.com," "vtarget.com," and "vmlocal.com." *Id*. at 1064. Here,

9   Plaintiff alleges that the email headers include "false or misrepresented" sender names, (e.g.,

10   "Liana Christian"), separate and apart from the domain name (i.e., "linkedin.com"). Plaintiff

11   claims that this practice is particularly deceptive because the emails misappropriate LinkedIn's

12   goodwill, as they are sent through the linkedin.com domain without permission.

13   This is a difference without a distinction. The gravamen of Plaintiff's claim is identical to

14   the theory that the Ninth Circuit has already rejected. Plaintiff alleges that the emails are

15   deceptive because the headers do not reveal "*who* is advertising in the email." FAC ¶¶ 33, 34.

16   Plaintiff does not claim that the email headers contain fraudulent information. For example, he

17   does not allege that "Liana Christian" is an actual person, and that the email sender masqueraded

18   as her, thereby misappropriating her identity.[6] Plaintiff also does not allege that the headers were

19   deceptive because the emails *appeared to come* from the linkedin.com domain, for, as Plaintiff

20   concedes, all of the emails *did come* from the linkedin.com domain. The alleged violation of

21   LinkedIn's user agreement might amount to a breach of contract, but the headers do not falsely or

22   deceptively misrepresent the domain from which the emails actually traveled.

23   Plaintiff also does not allege that the header information deceived him into believing that

24   the email was not commercial in nature,[7] or that he could not identify the true sender. In fact, like

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26   [6] This practice is known as "email spoofing," by which "the header of an e-mail appears to have
     originated from someone or somewhere other than the actual source." Dep't of Justice News
27   Release, "FBI Says Web 'Spoofing' Scams Are a Growing Problem" (July 21, 2003) 2003 WL
     21692056 (D.O.J.).

28   [7] It is unlikely Plaintiff could plausibly allege that he was deceived, given the clearly commercial

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1   the plaintiff in *Gordon*, Plaintiff admits that he was able to ascertain the true sender, and

2   acknowledges that all of the emails at issue advertised the same five websites.[8]

3   Accordingly, the court concludes that the headers at issue in this case are not meaningfully

4   different from the headers at issue in *Gordon*, which the Ninth Circuit held did not "rise[] to the

5   level of 'falsity or deception' within the meaning of the CAN-SPAM Act's preemption clause."

6   *See Gordon*, 575 F.3d at 1064.

7   *Gordon* is the governing Ninth Circuit precedent on the issue of CAN-SPAM Act

8   preemption. Unfortunately, Plaintiff did not address or distinguish *Gordon* in his opposition

9   brief,[9] and Defendants did not discuss *Gordon* at length in their submissions. Accordingly, before

10 the hearing, the court ordered the parties to submit supplemental briefing addressing, among other

11 things, the applicability of *Gordon* to this case. [Docket No. 33.] In his supplemental brief,

12 Plaintiff distinguishes *Gordon* on the basis that it examined preemption of Washington state law,

13 not section 17529.5. This is not a persuasive distinction. Plaintiff also argues that *Gordon* did not

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16 subject line of the exemplar email: "How a newbie banked $5K THIS WEEK…What Nobody Told You About."

17 [8] To the extent that Plaintiff contends that the "from" field must include the names of the entities
18 advertising in the emails, that is precisely the type of content or labeling requirement that the
    Ninth Circuit has held to be "clearly subject to preemption." *Gordon*, 575 F.3d at 1064.

19 [9] In his opposition, Plaintiff cites a number of cases in which district courts addressed whether a
20 plaintiff seeking relief under section 17529.5 must allege and prove all of the elements of common
    law fraud, including reliance and damages, in order to satisfy the CAN-SPAM Act's preemption
21 exception. *See, e.g., Wagner v. Spire Vision*, No. C 13-04952 WHA, 2014 WL 889483, at *2-3
    (N.D. Cal. March 3, 2014); *Asis Internet Servs. v. Vistaprint USA, Inc.*, 617 F. Supp. 2d 989, 992-
22 94 (N.D. Cal. 2009); *Hoang v. Reunion.com*, No. C-08-3518 MMC, 2010 WL 1340535, at *4-6
    (N.D. Cal. March 31, 2010); *Asis Internet Servs. v. Subscriberbase Inc.*, No. 09-3503 SC, 2009
23 WL 4723338, at *3 (N.D. Cal. Dec. 4, 2009). These cases are inapposite because they did not
    address the issue before this court; specifically, whether the allegations of falsity or deception rise
24 to the level required to escape preemption under *Gordon*.

25   It is not clear why Plaintiff cited these cases, as Defendants do not contend that Plaintiff's
    claims are preempted because he failed to allege reliance and damages. However, the court notes
26 that 418 Media and Howes improperly made this argument for the first time in their supplemental
    brief. [*See* Docket No. 34.] The court will not consider arguments raised for the first time on
27 reply. *See United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It
    is improper for a moving party to introduce new facts or different legal arguments in the reply
28 brief than those presented in the moving papers.").

1   address the precise issue here, which involves Defendants' alleged deception by sending emails

2   through LinkedIn without permission. However, as analyzed above, the factual differences

3   between *Gordon* and this case do not support a different outcome.

4   Rather than attempt to grapple meaningfully with *Gordon,* Plaintiff relies primarily on

5   *Balsam v. Trancos, Inc.*, 203 Cal. App. 4th 1083 (2012). That case is distinguishable. In *Balsam*,

6   the court held that "header information in a commercial e-mail is falsified or misrepresented for

7   purposes of section 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the

8   actual sender on its face *nor* is readily traceable to the sender using a publicly available online

9   database such as WHOIS." *Id*. at 1101 (emphasis in original). The *Balsam* defendant explicitly

10   conceded that it deliberately hid its identity "behind an impenetrable shield of made-up [domain]

11   names." 203 Cal. App. 4th at 1099. The court concluded that the plaintiff's claims were not

12   preempted by the CAN-SPAM Act because the defendant's "deliberate use of randomly chosen,

13   untraceable domain names . . . for the stated purpose of concealing its role in sending them"

14   involved "deception as to a material matter—the sender's identity—as well as an element of

15   wrongful conduct." *Id*. at 1102-03.[10]

16   Unlike the plaintiff in *Balsam*, Plaintiff does not allege that the headers of the emails at

17   issue contained false and untraceable domain names. He admits that all were sent from

18   linkedin.com, a readily identifiable domain. Plaintiff also does not allege that he could not

19   determine the actual email senders; to the contrary, he alleges that the emails contained links to

20   five web pages operated by Defendants. FAC ¶¶ 4, 27, 36.

21   Finally, at oral argument Plaintiff appeared to contend that the emails were deceptive

22   because he was required to open them in order to determine the identity of the actual senders. The

23   California Court of Appeal has rejected this argument. In *Balsam*, the court based its ruling on the

24   fact that the sender deliberately used untraceable domain names. But the court explicitly

25   "express[ed] no judgment about other circumstances in which . . . the presence of other

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28   [10] As Plaintiff relies so heavily on *Balsam*, it is important to note that *Balsam* did not address the
     fact that the Ninth Circuit had held that the CAN-SPAM Act preempts any state law requirement
     that the actual sender be identified in a commercial email header. *See Gordon*, 575 F.3d at 1064.

1   information identifying the sender in the body of the e-mail could affect liability under the

2   statute." 203 Cal. App. 4th at 1101 n.17. Two years after *Balsam* was decided, the California

3   Court of Appeal in *Rosolowski v. Guthy-Renker LLC*, 230 Cal. App. 4th 1403, 1407 (2014), held

4   that "a header line does not misrepresent the identity of the sender merely because it does not

5   identify the official name of the entity which sent the e-mail, or merely because it does not identify

6   an entity whose domain name is traceable from an online database, *provided the sender's identity*

7   *is readily ascertainable from the body of the e-mail*." (emphasis added). *See also Wagner*, 2015

8   WL 876514, at *4-5 (granting summary judgment on 17529.5(a)(2) claim because emails in

9   question "provided a hyperlink to the advertiser's website, an unsubscribe link, and a mailing

10   address for the sender. The sender's identity could thus be readily ascertained from the bodies of

11   the emails."). Here, Plaintiff admits that the bodies of the emails readily reveal the identity of the

12   senders. Accordingly, Plaintiff's claim that he was required to open the emails in order to

13   determine their senders is not actionable.

14   In sum, the court concludes that as in *Gordon*, Plaintiff's "alleged header deficiencies

15   relate to, at most, non-deceptive statements or omissions and a heightened content or labeling

16   requirement." *See Gordon*, 575 F.3d at 1064. They are accordingly preempted by the CAN-

17   SPAM Act. The court therefore need not reach Defendants' remaining arguments.

18   **B.   Leave to Amend**

19   Federal Rule of Civil Procedure 15(a) establishes that leave to amend "shall be freely given

20   when justice so requires." In general, valid reasons for denying leave to amend include undue

21   delay, bad faith, prejudice, and futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here,

22   Plaintiff's sole claim is for violation of section 17529.5. While the court has serious doubts about

23   Plaintiff's ability to plead his claims to escape federal preemption, it cannot categorically state that

24   Plaintiff's claims are futile. Accordingly, Plaintiff is granted leave to amend the complaint.
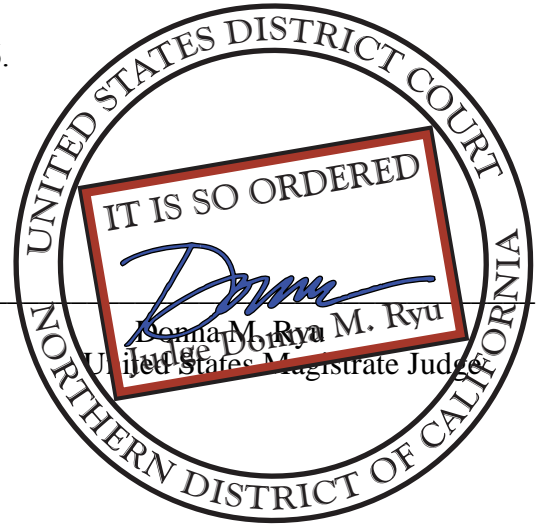
25   **IV.   CONCLUSION**

26   For the foregoing reasons, Plaintiff's complaint is dismissed as preempted. Plaintiff may

27   file an amended complaint in conformance with this order within 14 days of the date of this order.

28   The June 29, 2016 case management conference is CONTINUED to August 31, 2016, with the

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1   parties' joint CMC statement due by August 24, 2016.

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3   **IT IS SO ORDERED.**

4   Dated: June 27, 2016

5   IT IS SO ORDERED

6   _____
                                                      Donna M. Ryu
7   United States Magistrate Judge

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